No. 04-50185

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee-Respondent,

v.

JUAN JOSE VIDAL,

Appellant-Petitioner.

Appeal from the United States District Court
for the Southern District of California
Honorable Jeffrey T. Miller, District Judge

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	U.S.C.A. No. 04-50185
	)	
Plaintiff-Appellee,	)	U.S.D.C. No. 03cr1178-JM
	)	
v.	)	
	)	
JUAN JOSE VIDAL,	)	
	)	
Defendant-Appellant.	)	
	)	

I.

INTRODUCTION

The Opinion, United States v. Vidal, 426 F.3d 1011 (9th Cir. 2005),[1] by Ninth Circuit Judge Rymer and Eighth Circuit Judge MaGill, over Ninth Circuit Judge Browning's dissent, should be withdrawn. See Fed. R. App. P. 35(b), 40; 9th Cir. Rule 35-1. Using the categorical approach of Taylor v. United States, 495 U.S. 575, 110 S. Ct. 2143 (1990), the Opinion concludes 1) that a violation of California Vehicle Code Section 10851(a) constitutes a "theft offense" for purposes of increasing a sentence pursuant to U.S.S.G. § 2L1.2; 2) California aiding and abetting liability is not broader than the generic definition of aiding and abetting; and 3) regardless of whether § 10851(a) and California aiding and abetting are over broad,

[1] See Appendix A.

Mr. Vidal pled guilty to a predicate offense. Not only is the Opinion is wrong in every respect, its conclusions contradict numerous decisions of this Court.

First, § 10851(a) expressly applies to any "person who is a party *or an accessory* to or an accomplice in the driving or unauthorized taking or stealing" of the vehicle. Cal.Vehicle Code § 10851(a) (emphasis added). California law distinguishes accomplice liability from accessory liability. See People v. Horton, 11 Cal.4th 1068, 1114 (1995)("A mere accessory ... is not an accomplice."). Although § 2L1.2 Note 5 extends liability to accomplices, it does not extend to accessories. Indeed, this Court, has held accessory after the fact liability cannot constitute a predicate offense. See United States v. Innie, 7 F.3d 840 (9th Cir. 1993). Thus, "it is beyond dispute that, by criminalizing accessories, § 10851(a) covers a broader range of conduct than does the Sentencing Guidelines generic 'theft offense.'" Vidal, 426 F.3d at 1019 (Browning, J., dissenting).

Second, the Opinion's conclusion that California aiding and abetting liability requires proof of all elements contained in the federal definition of aiding and abetting liability conflicts with the California Supreme Court's, and this Court's, interpretation of California aiding and abetting liability. Although under California law "the accomplice must share the specific intent of the perpetrator," People v. Prettyman, 14 Cal.4th 248, 259 (1996), "a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet

(the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." Id. at 261. Thus, in California, "[i]t follows that a defendant whose liability is predicated on his status as an aider and abettor *need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator.*" People v. Croy, 41 Cal.3d 1, 12 n.5 (1985)(emphasis added). In contrast, the generic core meaning of aiding and abetting dictates that "[i]n order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' " Nye & Nissen v. United States, 336 U.S. 613, 619, 69 S.Ct. 766, 93 L.Ed. 919 (1949) (quoting United States v. Peoni, 100 F.2d 401, 402 (2nd Cir.1938) (Hand, J.)). Put simply, California aiding and abetting liability -- which the aider and abettor "need not have intended to encourage or facilitate the particular offense" -- is broader than federal aiding and abetting liability because the generic aider and abettor must possess "'the requisite intent of the underlying offense.'" United States v. Sayetsitty, 107 F.3d 1405, 1412 (9th Cir. 1997) (quoting United States v. Gaskins, 849 F.2d 454, 459 (9th Cir. 1988)).

Third, by reaching the conclusion that the generic federal definition of theft offense includes temporary or *de minimis* deprivations of property, the Opinion is in direct conflict with this Court's decision in United States v. Corona-Sanchez, 291

F.3d 1201 (9th Cir. 2002) (en banc). In Corona-Sanchez this Court held that "theft offense" must be defined "in terms of its generic, core meaning," id. at 1204, looking to how the term is "now used in the criminal codes of most States." Id. at 1205. "*By far the most common approach*" of state theft statutes requires the intent "to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value." 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.5, at 88 (2003) (footnotes omitted) (emphases added) ("LaFave")(quoting Model Penal Code § 223.0(1)). While Corona-Sanchez recognized that a deprivation may be "less than total or permanent" -- as do the majority of states -- Corona-Sanchez prohibits the Opinion's expansion of the term "theft offenses" to include any temporary or *de minimis* deprivations because that is not how the term "theft" is used in the criminal codes of most States. See Corona-Sanchez, 291 F.3d at 1205 (adopting definition consistent with "criminal codes of most States").

Finally, the modified categorical approach does not show that Mr. Vidal was convicted of a generic theft offense. The Opinion's conclusion that "Vidal admitted that he took a vehicle belonging to someone else, without the owner's consent, intending to deprive the owner of title and possession" is inconsistent with the record and conflicts with this Court's decision in Penuliar v. Ashcroft, 395 F.3d 1037 (9th Cir. 2005). Specifically, as correctly noted by the dissent, Mr. Vidal's charging papers, signed plea agreement, and judgment of conviction "merely recite[] the

generic language of § 10851(a)." Vidal, 426 F.3d at 1019 (Browning, J., dissenting). Thus, the record does not preclude -- as it must -- the posibility that Mr. Vidal was convicted as an accessory, aider and abettor, or for a temporary deprivation of property. Indeed, in Penuliar, this Court held that a guilty plea to a similarly worded complaint did not establish a predicate conviction.

II.

ARGUMENT

A. By criminalizing accessories, § 10851(a) covers a broader range of conduct than does the Sentencing Guidelines' generic "theft offense."

Under §2L1.2, an eight-level upward enhancement applies where the defendant has suffered an "aggravated felony." An "aggravated felony" includes theft offenses for which the term of imprisonment is at-least one year. See 8 U.S.C. §1101(a)(43). This Court employs the categorical approach to determine whether a prior conviction qualifies as an aggravated felony. See Corona-Sanchez, 291 F.3d at 1203. Under the "categorical approach," an offense qualifies as an aggravated felony "if and only if the 'full range of conduct' covered by [the statute] falls within the meaning of that term." Chang v. I.N.S., 307 F.3d 1185, 1189 (9th Cir. 2002)(quotations and citations omitted).

Here, the Opinion erred in finding that Mr. Vidal's conviction under California Vehicle Code § 10851 categorically qualified as a "theft offense." A conviction

under § 10851 is not categorically an aggravated felony because the statute encompasses liability to accessories while § 2L1.2 does not.

California Vehicle Code § 10851(a) provides in relevant part:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense[.]

Thus, the statute expressly applies to "any person who is a party or *an accessory to* or an accomplice in the driving or unauthorized taking or stealing." Cal.Veh.Code § 10851(a)(emphasis added).

Under California law, accessory liability is distinct from accomplice liability. Accessory liability lies only when a "person ... after a felony has been committed, harbors, conceals or aids a principal in such felony." Cal. Penal Code § 32. Indeed, the California Supreme Court has noted the difference stating, "[a] mere accessory ... is not liable to prosecution for the identical offense, and therefore is not an accomplice." Horton, 11 Cal.4th at 1114. Thus, "the language of § 10851(a) extending liability to 'an accessory to' the unlawful driving or taking of another's vehicle can only be understood properly to reach parties who sufficiently and knowingly aid a principal after the commission of the offense." Vidal, 426 F.3d at 1018-19 (Browning, J., dissenting). See also Penuliar, 395 F.3d at 1044 ("As the

statute makes plain, California Vehicle Code § 10851(a) includes accessory *or* accomplice liability.")(emphasis added).

In contrast, although § 2L1.2 extends liability to aiding and abetting, conspiracy and attempts, it does not extend to accessories after the fact. See Innie, 7 F.3d at 843. In Innie, a case involving the determination of a crime of violence for career offender purposes,[2] the government argued that being an accessory after the fact is analogous to conspiring or aiding and abetting an offense. This Court held, however,

> the offense of being an accessory *after* the fact is clearly different from aiding and abetting. Unlike one who aids or abets a crime of violence, an accessory after the fact does not aid in the commission of the underlying offense. Similarly, unlike one who conspires to commit a crime of violence, an accessory after the fact does not agree to commit the crime of violence.

Id. at 853. Thus, because § 10851(a) applies to accessories, it is broader than the meaning of "theft offense" contained in § 2L1.2. See Vidal, 426 F.3d at 19 (Browning, J., dissenting). As the Opinion fails to recognize that § 10851(a) is broader than the federal definition of theft offense it must be withdrawn or the case reheard en banc.

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[2] The Application Notes to the career offender guideline and § 2L1.2 are substantially similar. Compare U.S.S.G. § 2L1.2 n.5, with U.S.S.G. § 4B1.2 n.1.

B. **California aiding and abetting liability is broader than generic aiding and abetting because in California an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator.**

Quoting Prettyman, the Opinion holds that under California law,

> an aider and bettor is a person who, acting with (1) with knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging or facilitating the commission of the offense, (3) by act or advice, aids, promotes, encourages or instigates the commission of the crime.

Vidal, 426 F.3d at 1016 (quoting Prettyman at 14 Cal.4th at 259)(other quotations omitted). Further, quoting Prettyman, the Opinion also holds that under California law, "[w]hen the charged offense is a specific intent crime, as is the unlawful taking of a vehicle, 'the accomplice must share the specific intent of the perpetrator.'" Id. (footnote omitted). Unfortunately for the continued viability of the Opinion, Prettyman and this Court recognize that California aiding and abetting liability is not so limited.

Prettyman also held that "a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." Prettyman, 14 Cal.4th at 261. Thus, in California, "[i]t follows that a defendant whose liability is predicated on his status as an aider and abettor *need not have intended to encourage or facilitate the particular offense ultimately committed*

by the perpetrator." Croy, 41 Cal.3d at 12 n.5 (emphasis added). In short, California aiding and abetting law does not adhere to the strict mens rea requirements of its federal analogue.

This Court has repeatedly acknowledged California's expansion of aiding and abetting liability. See Juan v. Allen III, 408 F.3d 1262, 1279 n.5 (9th Cir. 2005); Solis v. Garcia, 219 F.3d 922, 927 (9th Cir. 2000); Windham v. Merkle, 163 F.3d 1092, 1101 (9th Cir. 1998). As noted in Juan, "[t]o obtain a conviction under this theory, the jury must find the elements of aiding and abetting with respect to the target crime and 'must also find that [] the defendant's confederate committed an offense *other than* the target crime; and [] the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted.'" Id. (quoting Prettyman, 14 Cal. 4th at 262). Thus, contrary to the Opinion's insistence, it is clear "that a [California] defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator." Croy, 41 Cal.3d at 12 n.5.

In contrast, the generic meaning of aiding and abetting liability demands that the aider and abettor possess "'the requisite intent of the underlying offense.'" Sayetsitty, 107 F.3d at 1412. This Court recently stated, "[i]t is well-established that '[i]n order to aid and abet another to commit a crime it is necessary that a defendant

"in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" Altamirano v. Gonzalez, 427 F.3d 586, 954 (9th Cir. 2005)(quoting Nye & Nissen, 336 U.S. at 619)(other quotations omitted). In other words, "[t]o be convicted of aiding and abetting, the jury must find beyond a reasonable doubt that the defendant 'knowingly and intentionally aided and abetted the principals in each essential element of the crime.'" United States v. Bancalari, 110 F.3d 1425, 1429 (9th Cir. 1997) (quoting United States v. Dinkane, 17 F.3d 1192, 1196 (9th Cir. 1994)). Indeed, the Model Penal Code incorporates the limitation of applying aiding and abetting liability only to situations where the aider shares the intent of the principal, and the majority of states have adopted this view. See Valdez v. Bravo, 373 F.3d 1093, 1098 n.3 (10th Cir. 2004)(recognizing the Model Penal Code's limitations to aiding and abetting liability); Candace Courteau, The Mental Element Required for Accomplice Liability: A Topic Note, 59 La.L.Rev. 325, 333 (1998)("A majority of states, in line with the Model Penal Code, require that the accomplice have the 'intent to promote or facilitate the offense'"). Thus, the generic, core meaning of aiding and abetting -- which this Court must apply to predicate offenses under § 2L1.2 -- contains a limitation that the aider and abettor must possess "the requisite intent of the underlying offense." Sayetsitty, 107 F.3d at 1412.

Sayetsitty's resolution of the issue of the mens rea required by federal law in

order to establish aiding and abetting liability is dispositive on the issue of how the term as employed in the Guidelines. Indeed, the panel "assumes" Sayetitty's interpretation of aiding and abetting applies, Vidal, 426 F.3d at 1016, rather than claiming it was somehow entitled to ignore Sayetsitty. It certainly makes no claim that the United States Sentencing Commission intended to adopt (*sub silentio*) some reading of the term "aiding and abetting" other than that employed in federal law.

Because Sayetsitty is binding, the confusion as to the scope of aiding abetting liability experienced by some commentators, such as Professor LaFave, is irrelevant. Indeed, LaFave has made internally inconsistent claims about the "the established rule" and the "prevailing view." Compare LaFave, § 13.3(b), p. 361 ("[t]he established rule, as it is usually stated by courts and commentators, is that accomplice liability extends to acts of the principal in the first degree which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided.") with Id. § 13.2(c), p. 346.("[t]he prevailing view is that the accomplice must also have the mental state required for the crime of which he is to be convicted on an accomplice theory.").[3] At any rate, even LaFave recognizes that the federal approach

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[3] LaFave appears to be mistaken in his assessment of the support enjoyed by the natural and probable consequences theory. He cites only seven jurisdictions is support, and one of those has recognized its error and abandoned the doctrine. Compare, State v. Carrasco, 122 N.M. 554, 928 P.2d 939 (1996) with State v. Carrasco, 946 P.2d 1075, 1079 (1997) ("a jury must find that a defendant *intended* that the acts necessary for *each* crime be committed"). In

is the "better view." LaFave, § 13.3(a), p. 358 (quoting 1 National Comm'n on Reform of Federal Criminal Laws, Working Papers 156 (1970)). Nothing in the guidelines suggests an intention on the part of the Sentencing Commission silently to reject the federal adoption of the "better view" in favor of the "lesser view" of a small number of states. Finally, "to the extent there is some inconsistency among the states ... the federal statute lends guidance to the meaning of the term ... as used in the Sentencing Guidelines." United States v. Velasquez-Reyes, 427 F.3d 1227, 1231 (9th Cir. 2005). The federal aiding and abetting statute, 18 U.S.C. § 2, clearly requires that the aider and abettor must possess "the requisite intent of the underlying offense." Sayetsitty, 107 F.3d at 1412 (quotation omitted).

This Court has already recognized the serious flaws in the "natural and probable consequence" doctrine and rejected its application to aiders and abettors. See United States v. Andrews, 75 F.3d 552, 555-56 (9th Cir. 1996). While Andrews held the jury could infer that the aider and abettor intended the natural and probable

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contrast, the following jurisdictions have adopted statutes that apply aiding and abetting liability only to situations where the aider shares the intent of the principal. See Ala..Code § 13A-2-23 (2005); Ariz. Rev. Stat. Ann. § 13-301 (2005); Ark. Code. Ann. § 5-2-403 (Michie 2005); Colo. Rev. Stat. Ann. § 18-1-603 (West 2005); Del. Code Ann tit. 11, § 271 (2005); Haw. Rev. Stat. Ann. § 702-222 (Michie 2005); 720 Ill. Comp. Stat. Ann. 5/5-2 (West 2005); Ky. Rev. Stat. Ann. § 502.020 (Banks-Baldwin 2005); Mo. Ann. Stat. § 562.041 (West 2005); N.H. Rev. Stat. Ann. § 626:8 (2005); N.J. Stat. Ann.§ 2C:2-6 (West 2005); N.D. Cent. Code § 12.1-03-01 (2005); Or. Rev. § Stat. 161.155 (2005); 18 Pa. Cons. Stat. Ann. § 306 (2005).

consequences of *his* actions, this Court rejected the argument that the aider and abettor could be held liable for the natural and probable consequences of the *principal's* actions. Id. at 556. Indeed, this Court noted that "[a]llowing the jury to infer that [the principal's] actions were the natural and probable consequences of [the aider and abettor's] knowing actions would take the natural and probable consequence doctrine to an extreme, 'inconsistent with more fundamental principles of our system of criminal law.'" Id. (quoting LaFave & Scott, Substantive Criminal Law § 6.8, at 158 (1986)). As the Opinion overlooked that California aiding and abetting liability can arise from a doctrine that this Court has declared is "inconsistent with more fundamental principles of our system of criminal law," id., it must be withdraw or the issue must be reheard en banc.

C. The Opinion's conclusion that the generic federal definition of "theft offense" includes temporary or *de minimis* deprivations of property, conflicts with *Corona-Sanchez*

In Corona-Sanchez, this Court held that "when Congress described predicate offenses [for federal sentencing], it meant to incorporate 'the generic sense in which the term is now used in the criminal codes of most States.'" Corona-Sanchez, 291 F.3d at 1204 (quoting Taylor, 495 U.S. at 598). In Corona-Sanchez, this Court was faced with the identical task as presented here: determining the definition of "theft offense." This Court stated that "our first task is to construe and define the meaning of the phrase." Id. at 1204. This methodology looks to how "'the term is now used

in the criminal codes of most States.'" Id. at 1205 (quoting Taylor, 495 U.S. at 598). Applying the correct methodology, this Court defined "theft offense" as "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." Id.

Although Corona-Sanchez ultimately held that the generic theft definition included deprivations that were "less than total or permanent," it never construed the meaning of "deprive." Thus, Corona-Sanchez left open the question what constitutes a sufficient deprivation, but its analysis dictates that the definition must be consistent with how the term is used in most states. The Opinion ignores this basic tenet of the categorical approach by extending the definition of "theft offense" beyond that recognized in Corona-Sanchez to a theory of liability that exists only in a few state jurisdictions.

The majority of States define "intent to deprive" consistently with the Model Penal Code. As Professor LaFave explains:

> Precisely what kind of intent is needed is usually addressed in rather specific terms in modern statutes dealing with theft. *By far the most common approach is to follow the Model Penal Code*, which defines the word "deprive" (theft requires a "purpose to deprive") as "(a) to withhold property of another *permanently or for so extended a period as to appropriate a major portion of its economic value*, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it."

LaFave, § 19.5, at 88 (footnotes omitted) (emphases added) . Consistent with the Model Penal Code's definition of "deprive," the majority of states do *not* include an intent to make a temporary deprivation in their theft statutes. Id. at 88, n.4 &6 (citing theft statutes of twenty-one states: Alaska, Arizona, Arkansas, Connecticut, Delaware, Hawaii, Kentucky, Maine, Maryland, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Texas, and Wyoming). Indeed some states require an intent to make a permanent deprivation. Id. at 88 n.7 (citing theft statutes of Illinois, Kansas, Louisiana, Missouri, and Wisconsin). By contrast, a mere two modern state theft statutes permit a finding of liability upon a *de minimis* temporary deprivation. Id. at 88 n.8 (citing theft statutes of Georgia and South Dakota).

Given its emphasis on " the generic sense in which the term is now used in the criminal codes of most States," Corona-Sanchez clearly meant only to include the intent to make substantial deprivations, but not to temporary or *de minimis* deprivations, when it stated that a "theft offense" must include the criminal intent to deprive, including deprivations that were "less than total or permanent. By aligning itself with an extreme minority view, the Opinion creates a clear conflict with Corona-Sanchez.

D. The record does not unequivocally establish a predicate offense because the relevant documents merely recite the language of the over-broad statute.

Under the "modified categorical approach" the record must "unequivocally establish[] that the defendant was convicted of the generically defined crime." Corona-Sanchez, 291 F.3d at 1211. As Mr. Vidal's charging papers, signed plea agreement, and judgment of conviction "merely recite[] the generic language of § 10851(a)," Vidal, 426 F.3d at 1019 (Browning, J., dissenting), the record does not preclude -- as it must -- the possibility that Mr. Vidal was convicted as an accessory, aider and abettor, or for a temporary deprivation of property.

The dissent correctly notes that the judicially noticeable documents in this case merely recite the generic language of § 10851(a). Indeed,

> Vidal's judgment of conviction refers only to "Count 1"; his plea agreement reveals that he pled guilty to "Count 1 10851(a) VC DRIVING A STOLEN VEHICLE [sic]"; and his charging papers simply recite § 10851(a)'s generic statutory language with the date and Vidal's and another's names inserted.

Vidal, 426 F.3d at 1019 n.10 (Browning, J., dissenting). Thus, instead of admitting a generic theft offense, the documents establish a generic violation of § 10851(a) which is over-broad because it extends liability to accessories, aiders and abettors and those that have the intent temporarily to deprive.

In fact, this Court has held substantially similar documents failed to demonstrate a plea to a generic theft offense. See Penuliar, 395 F.3d at 1045-46. As

in this case, the charging document in Penuliar merely recited the statutory language. This Court held, however, that even if Penuliar had pled guilty to unlawful taking or driving as alleged in the charging document and abstract of judgment, the record did not "unequivocally demonstrate" that he pled guilty to the activity of a principal because "under California law an accusatory pleading against an aider and abettor may be drafted in an identical form as an accusatory pleading against a principal." Id. (citing Corona-Sanchez, 291 F.3d at 1207-08). Thus, the Opinion's sole reliance on the complaint to hold that Vidal "admitted" acting as a principal, directly contradicts Penuliar's recognition that in "'California one may be convicted of aiding and abetting without the accusatory pleading reciting the aiding and abetting theory.'" Penuliar, 395 F.3d at 1045 (quoting People v. Greenberg, 111 Cal.App.3d 181, 188 (1980)). Accord People v. Garrison, 47 Cal.3d 746, 776, n.12 (1989)("notice as a principal is sufficient to support a conviction as an aider and abettor"). As such, the Opinion must be withdrawn or reheard en banc.

III.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

Dated: December 6, 2005

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C.A. No. 04-50185

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RESPONSE OF APPELLEE UNITED STATES TO APPELLANT JUAN JOSE VIDAL'S PETITION FOR REHEARING EN BANC

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUAN JOSE VIDAL, Defendant-Appellant.	)	C.A. No. 04-50185 D.C. No. 03CR1178-JM

I

QUESTION PRESENTED

Whether the district court properly found that a prior California conviction for vehicle theft, see Cal. Veh. Code § 10851(a), qualified as an "aggravated felony" for purposes of an advisory 8-level increase under USSG § 2L1.2(b)(1)(C).

II

REHEARING EN BANC IS NOT APPROPRIATE

Under the criteria in Fed. R. App. P. 35, rehearing en banc should be denied. This case is another instance of a defendant trying to stretch Taylor v. United States, 495 U.S. 575 (1990), to avoid a sentence enhancement the Sentencing Commission meant him to receive. This Court should not let that come to pass.

Appellant Juan Jose Vidal ("Vidal") was convicted by plea of being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. At sentencing, the court included an 8-level enhancement among the advisory Sentencing Guideline calculations under USSG § 2L1.2(b)(1)(C). It did so after finding that Vidal had previously been deported following an "aggravated felony" conviction for vehicle

theft under Cal. Veh. Code § 10851(a), for which he received a 365-day jail term. The district court's ruling was proper, as the Guidelines specifically contemplate that a "theft offense" for which the term of imprisonment was at least one year is an "aggravated felony." See USSG § 2L1.2(b)(1)(C) & cmt. n.3.

None of the attacks that Vidal makes on the panel majority's affirmance – all of which stem from his premise that a conviction for Cal. Veh. Code § 10851(a) is not a generic federal "theft offense" under Taylor's categorical analysis – warrants rehearing en banc. First, his claim that the generic federal definition of "theft offense" does not include convictions obtained as an accessory after the fact, whereas Cal. Veh. Code § 10851(a) does, is not only questionable as a legal matter, but immaterial: Vidal was not charged as an accessory in his prior conviction.

Second, Vidal's claim that California aiding and abetting liability is "broader" than the federal variety also fails. Vidal asserts that California's version extends to the "natural and probable consequences" of conduct aided and abetted, while federal law does not. Yet this Court has squarely held otherwise, as have sister circuits.

Third, Vidal's claim that California's vehicle theft statute allows for temporary deprivations of property, while a generic federal "theft offense" does not, also fails. See United States v. Corona-Sanchez, 291 F.3d 1201, 1205 (9th Cir. 2002) (en banc) (federal definition expressly includes deprivations "less than total or permanent").

Finally, Vidal's claim that the panel majority incorrectly found that his prior conviction satisfied Taylor's modified categorical approach also fails. The charging document pleads all elements of a generic federal "theft offense," and the judgment unequivocally reflects a guilty plea to a charge of Cal. Veh. Code § 10851(a).

Because the panel majority's opinion does not in any other way conflict with the law of this Circuit or raise a question of exceptional importance, see Fed. R. App. P. 35(a), rehearing en banc should be denied.

III

PRIOR PROCEEDINGS

Vidal was charged on April 23, 2003, with being a deported alien found in the United States, see 8 U.S.C. § 1326. [CR 1; ER 1.][1/] On October 17, 2003, he pled guilty without a plea agreement. [CR 14.] On March 19, 2004, he was sentenced to 33 months in custody and three years of supervised release. [CR 26.]

IV

ARGUMENT

A. A CONVICTION FOR CAL. VEH. CODE § 10851(a) SATISFIES THE GENERIC FEDERAL DEFINITION OF AN AGGRAVATED FELONY "THEFT OFFENSE"

For purposes of USSG § 2L1.2(b)(1)(C), the term "aggravated felony" has the meaning given that term in 8 U.S.C. § 1101(a)(43). See USSG § 2L1.2, cmt. n.3(A).

Pursuant to 8 U.S.C. § 1101(a)(43)(G), an aggravated felony includes "a theft offense . . . for which the term of imprisonment [is] at least one year." The statute does not define "theft offense." In United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2002) (en banc), this Court filled the gap by formulating a federal definition. A state theft conviction will qualify as a generic federal "theft offense" if it contains the following elements: (1) taking or exercising control over property, (2) without

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[1/] "CR" refers to the Clerk's Record. "ER" refers to Appellant Vidal's Excerpts of the Record.

consent, and (3) with criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. Id. at 1205.

The crime defined by Cal. Veh. Code § 10851(a) falls squarely within the generic federal definition of a "theft offense." In full, the statute provides:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or in the state prison or by a fine of no more than five thousand dollars ($5,000), or by both the fine and imprisonment.

Cal. Veh. Code § 10851(a) (emphasis added). The elements of the crime are: (1) driving or taking a car belonging to another, (2) without consent, and (3) with intent to deprive the owner, permanently or temporarily, of his title to or possession of the car. CALJIC 14.36. These match up with the elements of the generic federal "theft offense." See Corona-Sanchez, 291 F.3d at 1205. Consequently, the panel majority correctly concluded that "[t]here is no inconsistency between § 10851(a) and Corona-Sanchez's generic definition." United States v. Vidal, 426 F.3d 1011, 1014 (9th Cir. 2005).

B. THE MERE POSSIBILITY THAT ONE CAN BE CONVICTED OF CAL. VEH. CODE § 10851(a) AS AN "ACCESSORY AFTER THE FACT" IS NOT ENOUGH TO WARRANT REHEARING EN BANC

In his first attack on the panel majority's opinion, Vidal claims that Cal. Veh. Code § 10851(a) is broader than a generic federal "theft offense" because it allows for conviction as an accessory after the fact, while federal law allegedly does not.

[APR 5-7.][2/] Vidal notes that whereas Application Note 5 to USSG § 2L1.2 includes qualifying offenses obtained by "aiding and abetting, conspiring, and attempting" theories, it does not include "accessories after the fact." [APR 2, 7.] He also notes that in United States v. Innie, 7 F.3d 840 (9th Cir. 1993), this Court held that conviction as an accessory after the fact to murder for hire was not categorically a "crime of violence" within USSG § 4B1.1, the career offender Guideline.

This argument is not a valid grounds for rehearing en banc. For one thing, just because "accessory after the fact" is not included in Application Note 5 to USSG § 2L1.2 does not automatically mean convictions on that basis cannot categorically qualify as enhancing offenses. This Court has interpreted identical language as not creating an exhaustive list of liability theories. See United States v. Shumate, 329 F.3d 1026, 1030 (9th Cir.), amended by 341 F.3d 852 (9th Cir. 2003), cert. denied, 540 U.S. 1136 (2004). That holding governs here.

In Shumate, the defendant argued that "solicitation" of an otherwise qualifying offense under the career offender Guideline did not categorically count as a "controlled substance offense," since "solicitation" is not explicitly mentioned in Application Note 1 to USSG § 4B1.2. That note – like Application Note 5 to USSG § 2L1.2 – states that qualifying offenses "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." USSG § 4B1.2, cmt. n.1. In rejecting Shumate's narrow reading of this language, this Court found it significant that the list of liability theories "was preceded by the word 'include.'" Shumate, 329

[2/] "APR" refers to Appellant Vidal's petition for rehearing en banc.

F.3d at 1030. "In Guideline parlance '[t]he term "includes" is not exhaustive.'" Id. (citing USSG § 1B1.1, cmt. n.2)). As such, "'the omission of solicitation from the list [did] not carry legal significance,'" id. (citing United States v. Cox, 74 F.3d 189, 190 (9th Cir. 1996)), and a prior conviction for solicitation of a drug offense was found to qualify for a sentencing enhancement.

In light of Shumate, any claim that USSG § 2L1.2 does not include convictions obtained as an "accessory after the fact" simply because that theory of liability is not included in Application Note 5 cannot be well taken. Yet not only is that the focus of Vidal's petition for rehearing en banc [APR 2, 7], it is at the heart of the panel's dissent. Vidal, 426 F.3d at 1019 ("Although Application Note 4 [the predecessor to Note 5] to § 2L1.2 extends sentencing liability to aiders and abettors, it does not extend it to accessories.") (Browning, J., dissenting); see also id. at 1019 nn. 7 & 8. The opinion in Innie, upon which Vidal relies heavily, is guilty of the same error. See Innie, 7 F.3d at 852 (finding that accessory after the fact conviction was not a crime of violence for purposes of career offender Guideline, where "[n]o mention is made in [Application Note 1 to USSG § 4B1.2 of] the Guidelines of the offense of being an accessory after the fact to a crime of violence"). As Shumate postdates Innie, it calls into serious doubt the continuing viability of Innie on this point.[3/]

[3/] Indeed, Shumate criticized a Sixth Circuit decision for doing the same thing Innie did: assuming the list of liability theories set forth in Application Note 1 to USSG § 4B1.2 (and restated verbatim in Application Note 5 to USSG § 2L1.2) is exhaustive. See 329 F.3d at 1031 (noting that United States v. Dolt, 27 F.3d 235 (6th Cir. 1994), failed to "notic[e] the 'include' language in the Guideline note").

Even if one disregards the foregoing, rehearing en banc is still not warranted based on Vidal's arguments on accessory liability. Whether or not "accessory" convictions can legally qualify as enhancing offenses under USSG § 2L1.2, Vidal was not, in fact, convicted on that basis, as we will show below. So, regardless how one comes out on the legal issue, it will not change the result (judgment) in this case. Therefore, the extraordinary remedy of rehearing en banc is not merited. Kyocera Corp. v. Prudential-Bache Trade Serv., Inc., 341 F.3d 987, 1004-06 (9th Cir. 2003) (en banc) (Rymer, J., separate statement) (en banc review should not be taken, even if issue is of exceptional legal importance, where review will have "no effect on the outcome" of an appeal; "Even the Supreme Court lets go of a case when it recognizes that a decision on the issue on which certiorari was granted won't make any difference to the parties.") (citing Smith v. Butler, 366 U.S. 161 (1961) (dismissing writ of certiorari as improvidently granted, where, "[a]fter full argument and due consideration, it became manifest that the course of the litigation . . . did not turn on the issue on the basis of which certiorari was granted")).

As Vidal notes, liability as an accessory after the fact is distinct from that of an aider and abettor under California law, see People v. Nguyen, 21 Cal. App. 4th 518, 537, 26 Cal. Rptr. 2d 323 (Cal. Ct. App. 1993), and it has its own elements. [APR 6 (accessory liability lies only when a "person . . . after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony") (citing Cal. Penal Code § 32).]

That said, it is well-settled under California law that an "accessory after the fact must be charged with and prosecuted for an offense not included in the criminal act of the principal." People v. Prado, 67 Cal. App. 3d 267, 271, 136 Cal. Rptr. 521 (Cal. Ct. App. 1977) (emphasis added) (citing 1 Wharton's Criminal Law, 12th ed., § 285, p. 373 ("an accessory after the fact must be indicted and convicted as such"); 42 C.J.S. Indictments and Informations § 149, p. 1078 ("[H]e (the accessory after the fact) must be indicted as such, and cannot be treated as a principal.")).[4/] See also Cal. Penal Code § 971 (providing that "no other facts need be alleged in any accusatory pleading against" an "accessory before the fact," which necessarily means such "other facts" must be alleged against accessories after the fact) (emphasis added).[5/]

[4/] Federal law is in accord. See United States v. Hill, 279 F.3d 731, 740 (9th Cir. 2002) (to properly be charged as accessory after the fact, indictment "must plead the underlying offense as well as the accessory offense"); cf. United States v. Eaglin, 571 F.2d 1069, 1076 n.7 (9th Cir. 1977) (giving of jury instruction defining "accessory after the fact" was erroneous, where defendant was not charged as such).

[5/] Although the conviction at issue was incurred under California's Vehicle Code, Cal. Penal Code §§ 32 and 971 – dealing with the elements and pleading requirements for "accessory after the fact" – still apply. California courts have held that provisions of the Penal Code written in broad terms of general application apply not only to crimes in that code, but crimes in other codes, too. See People v. Brown, 49 Cal.2d 577, 591 n.4, 320 P.2d 5 (Cal. 1958) (Cal. Penal Code § 654, which prohibits multiple punishments for the same act, applied to Health & Safety Code; "Penal provisions are not confined to the Penal Code, and . . . the reference to 'this code' in section 654 was not intended to exclude penal provisions in other statutes."); People v. Morris, 237 Cal. App. 2d 773, 775, 47 Cal. Rptr. 253 (Cal. Ct. App. 1965) ("The provisions of § 654 of the Penal Code . . . apply not only to offenses described in that code but also to those described in the Vehicle Code").

Here, the felony complaint from Vidal's vehicle theft conviction did not charge him as an accessory. [CR 25; ER 39.] There is no mention of the terms "accessory" or "accessory after the fact." There is no citation to Cal. Penal Code § 32. There is no allegation that a felony was already committed by the time Vidal acted. There is no identification of a principal who was allegedly assisted. There is not even mention of any elements of accessory liability, such as "harboring, concealing, or aiding."

Thus, contrary to the dissent's belief, see Vidal, 426 F.3d at 1020 n.11 (Browning, J., dissenting), court records do unequivocally show that Vidal was not charged as an accessory. Any inference to the contrary is unreasonable. If Vidal was not charged as an accessory, he was necessarily not convicted as one. See Prado, 67 Cal. App. 3d at 271. If he was not convicted as an accessory, there is no reason to rehear en banc: resolution of the hypothetical issue whether "accessory after the fact" convictions can categorically qualify as "theft offenses" under USSG § 2L1.2 will not change the outcome of this case; even if they cannot, Vidal was not convicted as such. See Vidal, 426 F.3d at 1016 (panel majority refuses to delve into issue of accessory liability, as it would not "make any difference in this case because . . . Vidal pled guilty to taking the car," i.e., he pled guilty to conduct of a principal).

C. CALIFORNIA AIDING AND ABETTING LIABILITY IS NOT BROADER THAN ITS FEDERAL COUNTERPART

Next, Vidal claims the panel erred by rejecting his argument that aiding and abetting liability under California law is "broader" than its federal counterpart. [APR 8-13.] We respectfully disagree.

According to Vidal, one can be convicted in California of aiding and abetting even if he does not share the principal's mens rea; for, an aider and abettor is liable not only for the target crime, but other crimes committed by a principal "as a natural and probable consequence of the crime originally aided and abetted." [APR 8-9 (citing People v. Prettyman, 14 Cal.4th 248, 261, 58 Cal. Rptr. 2d 827 (Cal. 1996), and People v. Croy, 41 Cal.3d 1, 12 n.5, 221 Cal. Rptr. 592 (Cal. 1985)).] In contrast, Vidal claims federal law requires an aider and abettor to share the principal's intent. [APR 9 (citing United States v. Sayetsitty, 107 F.3d 1405, 1412 (9th Cir. 1997)).] As such, California liability is "broader." This, he says, bars any California conviction from satisfying the Taylor categorical approach, as it is possible to be convicted in California on an aiding and abetting theory that is not possible under federal law.

This claim must be rejected, as it turns on a mischaracterization of federal law. Contrary to Vidal's assumption, federal law also extends aiding and abetting liability to the "natural and probable consequences" of a principal's conduct. This Court has long held as much. United States v. Barnett, 667 F.2d 835, 841 (9th Cir. 1981) ("An aider and abettor 'is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him[.]'") (citation omitted); see also United States v. Castaneda, 16 F.3d 1504, 1512 (9th Cir. 1994) (aider and abettor is "liable for 'natural and probable' consequences of his actions") (citing Barnett, 667 F.2d at 841); United States v. Short, 493 F.2d 1170, 1172 (9th Cir. 1974) ("[T]he aider and abettor may be liable for the natural and probable consequences of the crime that he aided and abetted.").

Other circuits agree. United States v. Walker, 99 F.3d 439, 443 (2d Cir. 1996) ("aider and abettor is responsible not only for the success of the common design, but also for probable and natural consequences that flow from its execution, even if those consequences were not originally intended"); United States v. Miller, 22 F.3d 1075, 1078-79 (11th Cir. 1994) (same); United States v. Moore, 936 F.2d 1508, 1527 (7th Cir. 1991) (same); United States v. Graewe, 774 F.2d 106, 108 n.1 (6th Cir. 1985) ("aider and abettor is liable 'for any criminal act which in the ordinary course of things was the natural and probable consequence of the crime that he advised or commanded, although such . . . may not have been intended by him'") (citing Barnett, 667 F.2d at 841); United States v. Heinlein, 490 F.2d 725, 735 (D.C. Cir. 1973) (same); Russell v. United States, 222 F.2d 197, 199 (5th Cir. 1955) (same).

This Court's decision in Sayetsitty, 107 F.3d 1405, is not to the contrary. Vidal repeatedly cites it for the notion that federal law "requires" an aider and abettor to share the intent of the principal. [APR 9, 10, 12.] While Sayetsitty did include that concept in a list of "elements necessary to convict an individual under an aiding and abetting theory," id. at 1412, Sayetsitty never held that its particular recitation of elements was the only way to be convicted of aiding and abetting under federal law. More important, Sayetsitty never held that the "natural and probable consequences" doctrine is an invalid theory, or that it does not apply in the federal context. There is good reason: the doctrine was not before the Court, as it was not implicated on the

facts of that case.[6] Whatever the reason, the fact remains that Sayetsitty did not pass on the "natural and probable consequences" doctrine, nor did it criticize, overrule, or even mention this Court's many decisions endorsing that theory, including Barnett, Castaneda, and Short. As such, Sayetsitty cannot be cited for the idea that federal aiding and abetting liability does not extend to "natural and probable consequences." Webster v. Fall, 266 U.S. 507, 511 (1925) (authority is not precedential as to issues which are "neither brought to the attention of the court nor ruled upon").

Other cases that Vidal cites also fail to support him. He cites Juan v. Allen III, 408 F.3d 1262 (9th Cir. 2005), Solis v. Garcia, 219 F.3d 922 (9th Cir. 2000), and Windham v. Merkle, 163 F.3d 1092 (9th Cir. 1998), for the point that this Court has "repeatedly acknowledged California's expansion of aiding and abetting liability." [APR 9.] Yet there is no mention of the word "expansion" in any of these cases, or any discussion of the scope of California aiding and abetting compared to federal law.

Vidal also cites United States v. Andrews, 75 F.3d 552 (9th Cir. 1996), for the point that this Court has "already recognized the serious flaws in the 'natural and probable consequence' doctrine and rejected its application to aiders and abettors."

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[6] Sayetsitty involved a second-degree murder on an Indian reservation where there was no dispute that the defendants, two brothers, acted in concert in assaulting the victim. See 107 F.3d at 1408 (noting that both defendants kicked the defendant in the head at the same time, after which he died). As such, there was no reason to invoke the "natural and probable consequences" doctrine: the Government never proceeded on a theory that one or both defendants were guilty of the offense for aiding and abetting some other act, the "natural and probable consequence" of which was the murder of the victim. Cf. People v. Lee, 31 Cal.4th 613, 623-24, 3 Cal. Rptr. 2d 402 (Cal. 2003) (mentioning "natural and probable consequences" doctrine only in passing, where it was "not implicated on the facts presented here").

[APR 12.] That, too, is misleading. Far from announcing a blanket repudiation of the doctrine as a matter of federal law, Andrews only rejected its applicability to the particular facts of that case. Id. at 556 ("Allowing the jury to infer that Paula's actions here were the natural and probable consequence of Ivan's knowing actions would take the natural and probable consequences doctrine to an extreme, 'inconsistent with fundamental principles of our system of criminal law.'") (citation omitted) (emphasis added). So, even if Andrews does represent an anecdotal failure of the "natural and probable consequences" doctrine, that is not – as Vidal claims – the same thing as a pronouncement that the doctrine itself is invalid.

In sum, this Court has never invalidated a sentencing enhancement because of California's "natural and probable consequences" doctrine, nor should it do so now. If Vidal's position were adopted, then no California conviction could ever satisfy the Taylor categorical approach: as he notes, aiding and abetting is implied in every California charging document. [APR 17.] Surely, Congress did not intend this result for the most populous state in the Union. See Azarte v. Ashcroft, 394 F.3d 1278, 1288 (9th Cir. 2005) (courts must avoid interpretations that lead to absurd results).

D. FAR FROM CONFLICTING WITH CORONA-SANCHEZ, THE PANEL'S CONCLUSION THAT A FEDERAL "THEFT OFFENSE" INCLUDES TEMPORARY DEPRIVATIONS OF PROPERTY IS COMPELLED BY CORONA-SANCHEZ

Vidal also disputes that Cal. Veh. Code § 10851(a) falls within the scope of a generic federal "theft offense" because, he notes, the statute includes temporary as well as permanent deprivations of property. [APR 13-15; Cal. Veh. Code § 10851(a) (prohibiting vehicle theft "with intent either to permanently or temporarily deprive").]

According to Vidal, when this Court established a generic federal definition of "theft offense" in Corona-Sanchez, it "meant only to include the intent to make substantial deprivations, but not . . . temporary or de minimis deprivations." [APR 15.] This approach, he notes, is also that of the Model Penal Code ("MPC"). [APR 14-15.] Under the MPC definition of "theft," a "criminal intent to deprive" means an intent to deprive property "permanently or for so extended a period as to appropriate a major portion of its economic value." [APR 14.] Since Cal. Veh. Code § 10851(a) includes temporary deprivations of property, Vidal claims the panel opinion in this case "creates a clear conflict with Corona-Sanchez." [APR 15.]

Nothing could be farther from the truth. Corona-Sanchez held that the taking of property with intent to deprive of the rights and benefits of ownership is a "theft offense" under 8 U.S.C. § 1101(a)(43)(G), "even if such deprivation is less than total or permanent." 291 F.3d at 1205 (emphasis added). A temporary deprivation is clearly "less than total or permanent." As such, Vidal's representation that Corona-Sanchez "meant" to exclude temporary deprivations is without merit.

Vidal's reliance on the MPC also provides no basis for rehearing. He claims that the Code's definition of "deprive" should inform the federal definition of "theft offense," and he suggests Corona-Sanchez recognized as much. [APR 15.] Again, he is wrong. In Corona-Sanchez, this Court did consider use of the MPC to define a generic federal "theft offense," but rejected the idea – repeatedly. See Corona-Sanchez, 291 F.3d at 1205 ("Although use of the MPC is certainly a plausible approach, adoption of the standard established by the two other circuits that have construed the phrase makes more sense in a national context. In addition, the

Seventh Circuit's definition is closer to 'the generic sense in which the term [theft] is now used in the criminal codes of most States,' . . . than is the MPC's."); id. (criticizing the MPC's "provi[sion] for an ambitious plan of consolidation of smaller separate crimes into one larger crime called 'theft'").[7/]

As the panel majority noted, Corona-Sanchez "explicitly declined to embrace the [MPC] definition, whether or not it reflects the view of a majority of modern theft statutes." Vidal, 426 F.3d at 1014.[8/] If this Court, sitting en banc, has already rejected use of the MPC in defining a "theft offense," then Vidal's efforts to urge rehearing now, on the same basis, must be denied.

E. AT ANY RATE, VIDAL'S CONVICTION QUALIFIES AS A "THEFT OFFENSE" UNDER TAYLOR'S SO-CALLED MODIFIED CATEGORICAL APPROACH

Lastly, Vidal attacks the panel majority's conclusion that his conviction records show that he pled guilty to the elements of a generic "theft offense," anyway. See Vidal, 426 F.3d at 1017. According to Vidal, "the record does not preclude – as it must – the possibility that [he] was convicted as an accessory [after the fact], aider and abettor, or for a temporary deprivation of property." [APR 16.]

[7/] It also bears noting in Corona-Sanchez that the original panel decision had "adopted the definition of theft as contained in the Model Penal Code." See 291 F.3d at 1205. As such, the en banc Court's refusal to uphold the panel's opinion is only further proof that its rejection of the MPC was absolute.

[8/] Accord In re V-Z-S-, 22 I. & N. Dec. 1338, 1345 (BIA 2000) (en banc) ("[W]e also would find that the federal case law includes a somewhat broader concept of the perpetrator's intent than that embodied in the Model Penal Code definition of the term 'deprive.'").

This challenge also fails. It is settled law that a well-pled charging document and judgment can suffice, by themselves, to satisfy the modified categorical approach. United States v. Velasco-Medina, 305 F.3d 839, 851-52 (9th Cir. 2002), cert. denied, 540 U.S. 1210 (2004). Here, count one of the underlying complaint alleged:

> On or about June 21, 1994, JOSE LUIS MARTINEZ[9/] did willfully and unlawfully drive and take a vehicle, the personal property of GARY CRAWFORD, without the consent of and with intent to deprive the owner of title to and possession of said vehicle, in violation of VEHICLE CODE SECTION 10851(a).

[CR 25; ER 39.] This language alleges the (1) taking of a car belonging to another, (2) without consent, and (3) with intent to deprive the owner of title and possession – i.e., all elements of a generic federal "theft offense." See Corona-Sanchez, 291 F.3d at 1205. The judgment, in turn, reflects a plea to this count. [CR 25; ER 38.]

That is all the modified categorical approach requires. Vidal's arguments to the contrary lack merit. As the panel majority held, they "boil down to the same points that he believes categorically disqualify his prior conviction." Vidal, 426 F.3d at 1017. For instance, it does not matter that records do not disprove that Vidal was convicted of a temporary deprivation of property. As noted, a generic federal "theft offense" includes such deprivations. See Corona-Sanchez, 291 F.3d at 1205.

Nor does it matter that court records do not disprove that the conviction was incurred as an aider and abettor. In the context of sentencing enhancement, the Guidelines expressly allow for aiding and abetting convictions. See USSG § 2L1.2, cmt. n.5 ("Prior convictions of offenses counted under subsection (b)(1) include the

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9/ "Jose Lose Martinez" is one of Vidal's aliases.

offenses of aiding and abetting, conspiring, and attempting to commit such offenses.").[10/] And, as detailed above, Vidal is simply wrong that California aiding and abetting liability is "broader" than its federal counterpart.

Finally, the record does unequivocally show that Vidal was not convicted as an accessory after the fact. As noted, it is hornbook California law that accessories must be charged and convicted as such. See People v. Prado, 67 Cal. App. 3d 267, 271, 136 Cal. Rptr. 521 (Cal. Ct. App. 1977) (citations omitted). Here, the charging document did not charge Vidal as an accessory after the fact. [CR 25; ER 39.] It makes no mention of his being an "accessory"; it does not allege any element of accessory status (e.g., harboring); and, to the contrary, it charges Vidal with conduct of a principal, i.e., "willfully and unlawfully driving and taking" a vehicle. [Id.]

As there is no real dispute that the Government satisfied Taylor's modified categorical approach, rehearing as to that issue is not proper, either.

[10/] Application Note 5 of USSG § 2L1.2 also negates Vidal's reliance on Penuliar v. Ashcroft, 395 F.3d 1037 (9th Cir. 2005). Vidal claims that in Penuliar, "substantially similar documents failed to demonstrate a plea to a generic theft offense" because they did not disprove aiding and abetting liability. [APR 16.] But Penuliar was not decided in the criminal context; there is no analogue to Application Note 5 in 8 U.S.C. § 1101(a)(43), which was at issue in Penuliar. Thus, as the panel held, Penuliar has no import here "because it construed § 1101(a)(43)(G) alone, without commentary to USSG § 2L1.2 that includes aiding and abetting for purposes of enhancing the offense level for prior convictions." Vidal, 426 F.3d at 1015.

V

CONCLUSION

Vidal's petition for rehearing en banc should be denied.

Respectfully submitted,

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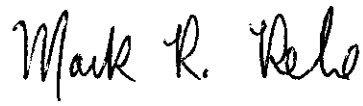

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CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-3, the attached response to a petition for rehearing en banc is:

☒ Proportionately spaced, has a typeface of 14 points or more and contains 4,194 words (petitions for panel rehearing or responses thereto must not exceed 15 pages or, in the alternative, 4,200 words or 390 lines of text), or is:

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

January 23, 2006
DATE

Mark R. Rehe
MARK R. REHE
Assistant U.S. Attorney

C.A. No. 04-50185

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the county of San Diego. I am over the age of eighteen years and not a party to the within action. My business address is Federal Office Building, 880 Front Street, Room 6293, San Diego, California 92101-8893.

On this date, I served the within Response of Appellee United States to Appellant Juan Jose Vidal's Petition for Rehearing En Banc in Court of Appeals No. 04-50185, by placing true copies in a sealed envelope with postage fully prepaid, in the United States Postal Service mail at San Diego, California, addressed as follows:

Clerk of the Court
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

(by Federal Express)

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225 Broadway, Suite 900
San Diego, CA 92101-5008

(by U.S. Mail)

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on January 23, 2006, at San Diego, California.

Marie Flores Baker